BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE FIRST DISTRICT OF ILLINOIS.

Opinion of Court Below.

The opinions of the Appellate Court of Illinois are reported in 305 Illinois Appellate Reports, at pages 289 and 494 respectively. They also appear in the record filed in this cause (Rec. 58-59), and in the appendix following.

Jurisdiction.

1. The jurisdiction of this court is based upon Section 237B of the Judicial Code as amended by the Act of January 13, 1925; Volume 8, Fed. Code Annotated (FCA), Title 28. Judicial Code, Section 344b.

2. The original date of the judgment of the Appellate Court of Illinois which is sought to be reversed is May 22, 1940 (Rec. 50). A petition for rehearing was filed within the ten days allowed by the rule of that court and the petition for rehearing was denied June 12, 1940 (Rec. 51). On the same date the petitioner's motion for a certificate of importance and an appeal to the Supreme Court of Illinois was likewise denied by the Appellate Court)Rec. 51). Thereupon on July 20, 1940, a petition for leave to appeal was duly filed in the Supreme Court of Illinois (Rec. 57). Said petition was denied on October 16, 1940 (Rec. 54).

3. The 14th Amendment to the Constitution of the United States was drawn in question by the Petitioner who specially set up and claimed rights and privileges thereunder, which were denied to him by the Courts of Illinois.

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari, which also contains a full statement of the questions presented, and in the interest of brevity are not repeated here. Any necessary elaboration on the evidence and on the points of law involved will be made in the course of the argument which follows.

Specification of Errors.

The Appellate Court of Illinois erred:

1. In affirming the order and judgment of the Circuit Court of Cook County which admitted to probate in the Estate of Harriet A. Mitchell, deceased, a carbon copy of the destroyed and revoked will of said deceased, as and for her last will and testament.

2. In failing to hold that the destroyed will had in fact been duly revoked by the testatrix and was of no legal effect at the time of her death.

3. In failing to hold that the destruction of the will by the agent of the testatrix, at her request was accomplished *animo revocandi* and that she duly ratified and confirmed the acts of her said agent, with like intent.

4. In failing to hold that the lapse of time between the destruction of the will and the death of the testatrix during which time she took no steps to restore or republish her will, clearly showed her acquiescence in its destruction and her desire that upon her death, her property should be distributed as an intestate estate.

5. In failing to give consideration to pertinent propositions of law applicable to this case and urged by this petitioner.

6. In failing to apply rules of law properly applicable to this case.

7. In failing to accord to petitioner a "certain remedy" and "complete" justice as guaranteed by the Illinois Constitution in consequence of which he has been denied due process of law as guaranteed by the Illinois and Federal Constitutions.

Summary of the Argument.

1. Accepting every phase of the respondent's testimony to be true, a revocation of the will has been clearly established. This proposition should not have been overlooked or ignored by the Appellate Court, as it represents the heart of petitioner's contention.

2. The destruction of a will can be ratified by a testator or testatrix so as to amount to its complete revocation. This is supported by Underhill on Wills and by authorities from the highest Courts of the States of Pennsylvania, North Carolina and New Jersey, which states have statutes regulating revocation of wills, similar in nature and effect as the statute of the State of Illinois.

3. The rule of law contended for by Petitioner is of first impression in the State of Illinois. This is not an attempt to compel the courts of Illinois to adopt a position or rule of law inconsistent with, in conflict, or in preference to its own interpretation, but to finally effect an adjudication of the points properly raised by petitioner in the Appellate Court of Illinois. Until such issues have been duly adjudicated, petitioner has been denied due process of law.

ARGUMENT.

The Federal question came into being by the failure of the Appellate Court of Illinois to pass upon the main point raised by this Petitioner in his appeal, to the effect that there had been a complete ratification by the testatrix of the destruction of her will. This proposition should not have been overlooked by the Appellate Court nor should it be permitted to remain unanswered as it represents the very heart of this case. Petitioner's position, that there had been a complete ratification by the testatrix, is borne out by the respondent's own testimony. Its legal effect supports this petitioner's contention, as will be seen from well-recognized authorities.

Underhill, in his excellent work on Wills, made the following pertinent statement (Sec. 225, page 308):

> "If the will is destroyed without the consent of the testator, the act of destruction may be a valid revocation if it is ratified by him subsequently. But the ratification must be evidenced by some act which the Court may with reason infer that the original act of destruction was approved by the testator."

It therefore becomes obvious that if the destruction of a will *without prior consent* can be ratified, as stated in the above rule, then surely the destruction of a will *with prior consent* can likewise be ratified.

In an attempt to refute the propriety of petitioner's legal position, the respondent, in the brief which she filed in the Appellate Court of Illinois, cited the case of *Dower* v. *Seeds*, 28 West Virginia 113. In that case the Supreme

Court of West Virginia made the following applicable observation on page 137:

> "It would seem that where the testator has done all that he designed to do for the purpose of actual destruction, and believes that he has accomplished it, a literal compliance with the statute is not indispensable."

In this proceeding the Appellate Court of Illinois had presented to it a set of circumstances which called into consideration rules of law of *first impression in that State.* Like situations have however arisen in other states of the union, where the rules announced by the Supreme Courts of those states sustain the contentions herein urged by this Petitioner. It is important to note that the three states hereinafter referred to have provisions in their Wills acts of similar character as Sec. 17 of the Wills act of the State of Illinois. The respective statutes and decisions are as follows:

Pennsylvania.

STATUTE:

Purdon's Pennsylvania Statutes Annotated, Title 20, Chapter 2, Sec. 271, Page 219:

> "No will in writing, concerning any real estate, shall be repealed, nor shall any devise or directions therein be altered, otherwise than by some other will or codicil in writing, or other writing declaring the same, executed and proved in the manner hereinbefore provided; or by burning, canceling, or destroying the same by the testator himself, or by someone in his presence and by his express direction."

Sec. 272, Page 233:

> "No will in writing, concerning any personal estate, shall be repealed, nor shall any bequest or direction

therein be altered, otherwise than as hereinbefore provided in the case of real estate, except by a nuncupative will made under the circumstances set forth in Section four of this act, and also committed to writing in the lifetime of the testator, and, after the writing thereof, read to or by him and allowed by him, and proved to be so done by two or more witnesses."

DECISION:

The Supreme Court of Pennsylvania, in *Deaves' Estate,* 140 Pa. State, 242, had presented to it for consideration, the question as to the propriety of probating the contents of a will, the original of which was lost about two years before the testator's death. The Testator had knowledge of the fact that the will was lost and there was testimony that he intended making a new will, but he never did so. In denying probate of the lost will, the following language of the court below is quoted with approval by the Supreme Court, on Page 246:

"The testator, in the present case, knew for nearly two years that he had no will. He knew that if he should die without making another will his estate would be distributed under the intestate laws of the state. If he saw proper to take the chance, we cannot question his right to do so. Suppose his house and all his papers, including his will, had been burned two years before his death, of which he had full knowledge. Would a court of equity permit him to prove the contents of the destroyed paper, for the purpose of perpetuating its contents? Such a proposition would be absurd. The answer of the chancellor would be, Make a new will yourself. If he should refuse to writ a new will, the beneficiaries under the destroyed one could not be permitted, after his death, to come into court and reproduce his lost will; but, if the supposed fire had occurred so short a time before his death as to make

it practically impossible or unreasonable for him to re-write his will, the court might permit its contents to be proved.

In the present case, the decedent knew that his will was lost for a long time, and had frequently said that he intended to make a new one, but he did not do it. The court will not now do for him what he either neglected or declined to do for himself. It would be to do what the decedent, perhaps, would not have done upon mature deliberation and would undoubtedly be an act of gross injustice to his heir-at-law."

In approving this language, Mr. Chief Justice Paxson, said on Page 248:

"This was an attempt to probate a will alleged to have been lost during the lifetime of the testator. There is no doubt that when it is shown that the will of a testator was in existence, unrevoked, at the time of his death, and was afterwards lost or destroyed, its contents may be proved by parol, and the will, as thus reproduced, may be admitted to probate. So much was decided in Foster's App. 87 Pa. 67. The weak spot in the appellant's case is that there was no proof that the testator left behind him an unrevoked will, or any will whatever. On the contrary, it is an admitted fact that the will, which it was alleged the testator had executed, was lost or destroyed in his lifetime, and that its loss was known to him months before his death. There was proof of his declarations that he intended to make another will, possibly containing the same provisions, but he never did so. Knowing that he had no will, he declined or neglected to make one. From this a presumption of revocation may fairly be inferred."

North Carolina.

STATUTE:

North Carolina Code, Chap. 81, Art. 2, Page 1639, Sec. 4133:

> "No will or testament in writing, or any clause thereof, shall be revokable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence and by his direction and consent; but all wills or testaments shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator, or in his presence and by his consent and direction; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, signed by him, or some other person in his presence and by his direction, and subscribed in his presence by two witnesses, at least; or unless the same be altered or revoked by some other will or codicil in writing, or other writing of the testator, all of which shall be in the handwriting of the testator, and his name subscribed thereto or inserted therein, and lodged by him with some person for safe-keeping, or left by him in some secure place, or among his valuable papers and effects, every part of which will or codicil or other writing shall be proved to be in the handwriting of the testator, by three witnesses at least."

DECISION:

The circumstances presented in the case of *Cutler* v. *Cutler*, 130 North Carolina, 1, are helpful to a consideration and determination of the present petition. In that case an attempt was made to probate a paper purporting to be a will, the script of which was badly mutilated, as if such

multilation had been accomplished by moths or vermin. It appears that the testator knew of the mutilated condition of this document long before his death but did nothing about it. The Supreme Court of North Carolina on page 3 of that case, used the following language:

> "The paper itself showed the mutilations, and, as there was much evidence tending to show that the testator knew of the defaced condition of this paper long before his death, it was contended by the cavetor that if he did not tear the paper himself that there is abundant evidence showing that he accepted it as a destruction of his will, and that he intended to die intestate. And while it was not denied that there was evidence tending to show this to be the fact, the propounders contended that, unless the script had been defaced by the maker, or by someone for him in his presence, and by his direction, the will was not revoked; that he could not ratify the obliteration or destruction of the will by the vermin if he wished to do so; that a will properly executed could only be revoked in the manner above stated, or by making another will; and his Honor being of the opinion that the law was as contended by the propounders, so instructed the jury in substance. In this we think there was error."

New Jersey.

STATUTE:

Revised Statutes of New Jersey, Title 3, sub-title 2, Chap. 2, Page 4, (3-2-4):

> "No written will, or any devise or bequest therein, or any clause thereof, may be revoked except by:
>
> (a) Burning, canceling, tearing or obliterating the same by the testator himself or in his presence by his direction and consent; or
>
> (b) Another will or codicil in writing revoking or altering the same, or other writing declaring the revo-

cation, executed in the manner in which wills are required to be executed."

DECISION:

A decision which clearly states the applicable rule of law contended for by this petitioner, is found in the case of *Campbell* v. *Smullen,* 96 New Jersey Equity, 724. In that case, the testatrix in 1919 consulted her lawyer, Mr. Simons, to whom she handed a carbon copy of her will of 1915, stating that she had lost the original will. As requested, the attorney thereupon prepared two wills, one for her and one for her husband. These wills were intended to be identical with the provisions and phraseology of the lost will of 1915. The new will was delivered to the testatrix, but it was never executed and she died shortly thereafter. An attempt was thereupon made to probate a carbon copy of the lost will of 1915. In denying probate, the Court of Errors and Appeals of New Jersey adopted the following language of its advisory master, as appears on page 727:

"Whatever would have been the situation before the time the testatrix went to Mr. Simons to have a new will drawn, it is unnecessary to consider.

At that time, six or seven months before her death, she knew that her will was lost, or where it could not readily be found. She realized that under those circumstances she would, if she died, be considered, or at least, be in danger of being considered to have died intestate. That must have been the reason why she had a new will drawn. Yet she never executed the new will—with all the opportunity for doing so, she must be presumed to have had a good reason for not executing it. Everyone is charged with the knowledge of the legal consequences of his acts and his omissions. It is clear that the decedent realized the possible situation at the time of her death, and with the opportunity to provide against it did nothing."

It is true that this Court will not attempt to settle a point of purely local law on which the courts of the various states may differ. The importance of the citations from other states, concerning similar circumstances and under similar statutes as above quoted, becomes apparent when this Court takes cognizance of the fact that this is not an attempt to compel the Illinois courts of review to adopt an interpretation of another state, in preference to or in conflict with its own interpretation, but to convince this court that the points properly raised by petitioner are substantial, and of such importance that the decision of the Appellate Court of Illinois in this proceeding is incomplete, that it fails to effect a complete adjudication of the issues raised in this cause, and that substantial justice is not rendered unless and until the issues thus raised are fully adjudicated. These issues were clearly ignored by the Appellate Court of Illinois, in consequence of which, this petitioner has been denied that complete adjudication and due process which are guaranteed to him by the Illinois and the Federal constitutions.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the errors herein pointed out may be duly corrected; that the law with respect to the matters herein asserted may be properly and authoritatively defined. To that end and for that purpose a writ of certiorari should be granted and this court should review the decision of the Appellate Court for the First District of Illinois, and finally, to reverse such decision.

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